

875—218.504(91D) Promotion work.

218.504(1) Promotion work is one type of activity often performed by persons who make sales, which may be exempt work depending upon the circumstances under which it is performed. Promotion employees are not exempt as “outside salespersons.” (This discussion relates solely to the exemption under rule 218.5(91D) dealing with outside salespersons. Promotion employees who receive the required salary and otherwise qualify may be exempt as administrative employees.) However, any promotional work which is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is clearly exempt work. Promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work.

218.504(2) Distribution through jobbers.

a. Typically, the problems presented involve distribution through jobbers (who employ their own salespersons) or through central warehouses of chain store organizations or cooperative retail buying associations. A manufacturer’s representative in these cases visits the retailer, either alone or accompanied by the jobber’s salesperson. In some instances, the manufacturer’s representative may sell directly to the retailer. In others, the employee may urge the retailer to buy from the jobber.

b. This manufacturer’s representative may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant’s shelves or rearranging the merchandise. These persons can be considered salespersons only if they are actually employed for the purpose of and are engaged in making sales or contracts. To the extent that they are engaged in promotional activities designed to stimulate sales which will be made by someone else, the work must be considered nonexempt. With these variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of the employee’s own sales, at least to the extent of obtaining a commitment to buy from the person to whom the employee is selling. If the employee’s efforts are directed toward stimulating the sales of the company generally rather than the consummation of the employee’s own specific sales, the employee’s activities are not exempt. Incidental promotional activities may be tested by whether they are “performed incidental to and in conjunction with the employee’s own outside sales or solicitations” or whether they are incidental to sales which will be made by someone else.

SOURCE: 29 CFR 541.504.